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No. 79-1922

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CENTRAL OF GEORGIA RAILROAD COMPANY,
Petitioner,

v.

JAMES E. HENDLEY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Respondent does not challenge in any real sense the reasons advanced in the Petition for granting the writ. However, he does endeavor to obscure and divert attention from the single issue of overriding significance presented by this case: the integrity of the Railway Labor Act's disputes resolution machinery—and the wise Congressional policy favoring arbitration that it embodies—when that machinery is challenged by resort to other forums. Indeed, Respondent would deny that this important Congressional policy is involved here at all. (Br. Opp., p. 15.) Thus, although the reasons we believe warrant grant of the writ are adequately stated in the Petition, we believe a Reply is warranted to correct several assertions contained in the Brief in Opposition.

I. Respondent's View of the "Scheme of Things" Is Erroneous.

Respondent does not deny that this is a wrongful discharge dispute, resolution of which this Court has made clear is within the exclusive province of the National Railroad Adjustment Board pursuant to the command of the Railway Labor Act, 45 U.S.C. § 153 First. *Andrews* v. *Louisville & Nashville Railroad,* 406 U.S. 320. Instead, he contrives an entirely different and erroneous "scheme of things" (Br. Opp., p. 14) in which the decision below more conveniently fits. We demonstrate below the errors in Respondent's "scheme."

1. Respondent's "scheme of things" rests on an asserted distinction between "labor disputes relating to employee interests arising from collective bargaining agreements" and "rights and remedies granted by statute" (Br. Opp., p. 8), the latter of which he terms "legal issues" (*id.*, p. 14). This distinction is imaginary. As pointed out in the Petition (p. 8), to the extent that Respondent has rights under Section 60, they are subsumed under those arising from his collective bargaining agreement. Since Respondent nowhere denies that this is so, his insistence (Br. Opp., p. 14) that "[t]here is no overlap or entanglement caused here between the role of the Courts and that of the labor agreements process" rings hollow indeed.

Equally devoid of substance are the labels Respondent resorts to in seeking to shrug off this Court's decisions in *Andrews,* 406 U.S. 320, and *Farmer* v. *United Brotherhood of Carpenters & Joiners,* 430 U.S. 290. He asserts that those cases did not involve a person "seeking protection of a statutory right under FELA Section 60," but involved respectively a claim under "the general law of contracts" and an allegation of "tort injury under State law." (Br. Opp., p. 14.) Labels aside, the substance of Respondent's claim is, like the one in *Andrews,* wrongful dicharge. (Pet., p. 7.)

Respondent's distinction is imaginary in a second respect. It is between, on the one hand, something that exists

—the administrative remedies mandated by the Railway Labor Act—and, on the other, a fantasy—civil "remedies granted by statute." (Br. Opp., p. 8.) There are no such civil "remedies" granted by Section 60, a criminal statute. (Pet., p. 10)[1] And, as this Court recently has noted, it has only rarely implied a private right of action to enjoin violations of a criminal statute and has done so only where there was a statutory basis. *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 316. Here the legislative history of Section 60 establishes that Congress intended that Respondent's remedy lie before the Adjustment Board, not the courts. (Pet., pp. 10-11.) Respondent cannot and does not dispute that this was Congress's intent.[2]

The availability to Respondent of an administrative remedy before the Board renders meaningless his protestations that Section 60 will be ineffective (Br. Opp., p. 9), "pointless" (*id.*, p. 10), or "worthless" (*id.*, p. 15). The simple fact is that a duplicative remedy is not necessary here to effectuate the congressional purpose behind Section 60. *Chrysler Corp.* v. *Brown*, 441 U.S. at 317.[3] Of overarching significance—again something that Respondent does not deny—such a duplicative remedy would allow circumvention of the Board, as occurred in this case, and hence

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[1] Nor does 45 U.S.C. § 56 (Br. Opp., p. 9) confer on courts jurisdiction to prohibit violations of Section 60, as a simple examination of Section 56 shows.

[2] Respondent strains credulity in attempting to avoid the lack of civil remedy under Section 60 by stating (Br. Opp., p. 8) that he "seeks not a civil remedy, but protection by a redress that Congress delegated to the court." What is an injunction if not a "civil remedy"? It may indeed be a form of "redress," but as shown above, the injunction Respondent sought under Section 60 is *not* a form of redress that Congress delegated to any court.

[3] Thus, since neither the purpose of Section 60 nor any rights Respondent might have under that provision will be disregarded, his reliance (Br. Opp., pp. 8-9) on *Texas & New Orleans R.R.* v. *Brotherhood of Ry. & Steamship Clerks*, 281 U.S. 548, and *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 87, is misplaced.

defeat the exclusive forum requirement that is central to effective operation of the Railway Labor Act's disputes resolution scheme. (Pet., p. 14.)[4]

2. Under Respondent's "scheme of things" he must "languish" before an incompetent and powerless Adjustment Board. (Br. Opp., p. 10.) In actuality, the Railway Labor Act requires him to exhaust his administrative remedy before resorting to the courts. (Pet., p. 10, n.11.) In actuality, the decisions of this Court make clear that the Adjustment Board is completely competent to interpret a collective bargaining agreement in light of a statute or, as Respondent puts it, to decide "legal issues" (Br. Opp., p. 14). *Union Pacific Railroad* v. *Sheehan*, 439 U.S. 89, 92-93 (*per curiam*); *Order of Railroad Telegraphers* v. *Railway Express Agency, Inc.*, 321 U.S. 342. (Pet., p. 9.) And, in actuality, Section 153 First (m) of the Railway Labor Act, which makes Board decisions "final and binding upon both parties to the dispute" (Pet. App. A, p. 1a), has long provided the Board with the necessary power to do what needs to be done.

3. Respondent's "scheme of things" overlooks the continuing efforts to avoid Railway Labor Act arbitration by artful pleading in federal and state courts. (Pet., p. 15.) It also ignores the fact that the decision below permits

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[4] Of course, a duplicative civil remedy also would allow circumvention of the Act's judicial review procedures, 45 U.S.C. § 153 First (p) and (q), just as occurred in the court below. (*See* Pet., p. 9, n.10.) Respondent suggests (Br. Opp., p. 6) that it was convenient to have "simultaneous consideration" in the court below of various matters making up the incomplete record on which the court acted. He also suggests (*ibid.*) that the review by the court below of this incomplete record was "thorough" and "exacting." But convenience and thorough review of an incomplete record are no substitute for the complete record and for the opportunity for Petitioner to have presented evidence and made legal arguments which would have resulted from adherence to the Act's judicial review procedures in this case. (*See* Pet., p. 9, n.10.)

such avoidance by sanctioning use of the simple device of artfully pleading some right under state or federal law. (Pet., pp. 14-15.)[5] Respondent's "doubts" that an identical "fact circumstance" will recur (Br. Opp., pp. 13-14) miss the mark. It is the *question* that can and does recur due to these continuing efforts to avoid arbitration. Further, "doubts" are no answer to the facts pointed out in the Petition exemplifying these efforts, notably, the two Ninth Circuit decisions with which the decision below is irreconcilable—*Magnuson* v. *Burlington Northern, Inc.*, 576 F.2d 1367 (9th Cir.), *cert. denied*, 439 U.S. 930 (1978), and *Railway Labor Executives Association* v. *Atchison, Topeka & Santa Fe Railway*, 430 F.2d 994 (9th Cir. 1970), *cert. denied*, 400 U.S. 1021 (1971) (*see* Pet., pp. 11-13.) Respondent cannot and does not dispute this conflict. Hence he ignores it entirely.

II. There Was a Clash Between the Results Reached by the Court Below and the Adjustment Board.

Respondent would erase the clash between the conflicting results reached by the Board and by the court below with respect to the merits of Respondent's grievance by mistakenly asserting (Br. Opp., p. 6) that the Board found Petitioner's discipline of Respondent "wrongful in prin-

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[5] Respondent does not even argue that the decision below will not have this effect. In token recognition of the problem, in his statement of facts he merely suggests (Br. Opp., p. 7), erroneously, that the effect of the decision below is limited by the statement of the court below that there may be instances in which a carrier may discipline an employee in connection with matters relating to an FELA case without violating Section 60. As we have shown (Pet., p. 14, n.18), this statement has no effect on the decision below as precedent for avoiding arbitration. The holding below was that a court has jurisdiction in a civil proceeding brought by an aggrieved employee to determine whether Section 60 is violated. (App. B, p. 15a.) Obviously, in exercising such jurisdiction, a court necessarily must decide the merits of whether Section 60—or whatever state or federal right is pleaded—has been violated.

ciple." In fact, the Board found that Respondent had "been disloyal to the Carrier" and that his "offense warrants disciplinary action." (Pet. App. F, p. 30a.) The court below found that Respondent had not been disloyal. (Pet. App. B, pp. 15a-16a.) Had this clash not existed, as Respondent suggests, the court below would not have found it necessary to declare the Board's decision "null and void." (*Id.*, p. 16a.)

III. This Is Not a Dispute Based on the Rights and Duties of a Union Representative.

Respondent mistakenly attempts to refashion his grievance into one based on the rights and duties of a union representative. (Br. Opp., p. 9.) It is no such thing. Respondent's grievance is now and always has been a dispute solely over his rights and duties as an *employee*.[6] Respondent's rights and duties as a union representative, whatever they may be, were not the basis for the relief he sought below[7] or before the Adjustment Board.[8] Nor did the court below rely on any such rights or duties. (Pet. App. B.) Most significantly, Section 60, on which Respondent does rely, protects "employees," not union representatives. (Pet. App. A, p. 3a.) The applicable collective agreement likewise protects him as an employee.

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[6] Accordingly, whatever responsibilities Respondent may have had as a union representative (Br. Opp., p. 2, n.2) are beside the point and his reliance on *Brotherhood of R.R. Trainmen* v. *Central of Georgia Ry.*, 305 F.2d 605 (5th Cir. 1962), is misplaced. Likewise, his frequent references to his status as a union representative (*e.g.*, Br. Opp., p. 5) have no bearing on this case.

[7] In his complaint (¶ 9), Respondent sought relief, not from interference with his duties as a union representative, but from interference with his "employment."

[8] The Board's award in this case (Pet. App. F, p. 27a), clearly shows that Respondent sought relief as a "Yardman," or "employee," and not as a union representative.

Section 153 First (i) of the Railway Labor Act invests the Adjustment Board with exclusive jurisdiction to resolve grievances between an "employee . . . and a carrier." 45 U.S.C. § 153 First (i) (Pet. App. A, p. 1a). Respondent cannot at this late date read the Railway Labor Act out of this case by refashioning his claim as one based on his rights or duties as a union representative, especially since doing so would remove any arguable basis for his Section 60 claim.

IV. Whether Section 60 Was Violated Is Not the Question Presented.

Respondent also attempts to divert the Court's attention from the Railway Labor Act's disputes resolution machinery by arguing extensively that Section 60 was violated. This is a non-issue. It has no bearing on the question presented in the Petition, namely, whether the Railway Labor Act mandates that the Adjustment Board resolve the dispute between Petitioner and Respondent over whether Respondent may be disciplined consistently with the collective agreement and Section 60. Thus, Respondent's counter-statement of the question presented (Br. Opp., pp. 1-2), which purports to inject as an issue the question of whether Section 60 was violated, is beside the point.[9] Likewise, Part II of Respondent's Brief in Opposition (pp. 10-13), which is devoted entirely to arguing that Petitioner violated Section 60, is devoid of bearing on the question presented in the Petition.[10]

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[9] In fact, Respondent's counter-question presented is circular. It assumes a violation of Section 60, the very question he purports to present. (Br. Opp., pp. 1-2.)

[10] Accordingly, language respecting a railroad's information disclosure rule in *Parden* v. *Terminal Ry. of the Alabama State Docks Dep't*, 377 U.S. 184, 197 n.14, quoted by Respondent (Br. Opp., p. 12), is inapposite.

We also are constrained to point out that Respondent errs badly in his description of several facts relevant to whether Section 60

CONCLUSION

The Petition for a Writ of Certiorari should be granted and the decision below summarily reversed with instructions to dismiss the complaint. Or, the Court may conclude that the case should be set for briefs and argument.

Respectfully submitted,

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was violated. (1) Respondent repeatedly asserts (Br. Opp., pp. 1, 3, 4, 5, 10) that he was a "witness" in the FELA case in connection with which he assisted in the surreptitious procurement of evidence that led to Petitioner's disloyalty charge against him. However, Respondent was never called as a witness in that action. (Pet., p. 4, n.2.) (2) Accordingly, it was not his "conduct as a witness" (Br. Opp., p. 7) that in fact was or could have been the subject of either Petitioner's investigation and disciplinary action against him or the Board's arbitration of this dispute. (*See* Pet., pp. 2-3; Pet. App. F, pp. 28a-29a.) (3) Respondent was not discharged for his role in assisting "the preparation of [an] FELA claim" (Br. Opp., p. 5); he was discharged for assisting in an unauthorized entry onto private property surreptitiously to procure photographs used as evidence in the FELA action. (Pet., pp. 2-4; Pet. App. F, pp. 29a-30a.) (4) Respondent was not discharged summarily one day after the conclusion of the FELA action, as he mistakenly asserts (Br. Opp., p. 2); rather, he was on that day temporarily suspended pending Petitioner's internal investigation. (Pet. App. F, p. 28a.)